

# „No one has the right to be homeless...”

---

Viktor Z. Kazai

2019-06-13T11:44:10

In its decision of 4 June, the Hungarian Constitutional Court [found](#) section 178/B of the Act on Misdemeanors – making “residing in public spaces as habitual dwelling” a punishable act – conform to the constitution. The majority of the justices ruled that “[a]ccording to the values of the Fundamental Law no one has the right to be poor or homeless, this status is not part of the right to dignity...” [para. 102] This decision is a clear manifestation not only of extreme deference to the government but also of the lack of basic humanity. While reading the reasoning of the Court, one has the impression that we are back in the socialist dictatorship again.

\*

In the summer of 2018, the Fidesz-KDNP governing majority amended the Fundamental Law of Hungary again. Section XXII – as modified by the [Seventh Amendment](#) – provides that living in public places on a permanent basis is prohibited, thereby providing a clear constitutional basis for the [criminalization of homelessness](#). Shortly after that the National Assembly inserted a new 178/B section in the Act on Misdemeanors making the act of “residing in public spaces as habitual dwelling” a petty offence punishable by community service work or confinement. Human rights NGOs and professional organizations raised their voices against the new legislation, but the government did not back down. When the first proceedings were initiated against homeless people in fall, several ordinary courts requested the Constitutional Court to annul the legislation. They alleged the unconstitutionality of the law on many grounds, but most importantly they all based their arguments on Decision no. 38/2012. (XI. 14.) in which the Court had found an almost identical provision contrary to the Fundamental Law.

As I have already analyzed the background of the case and the most important constitutional concerns in my previous [blogpost](#), I will not repeat myself. What follows instead is a short summary of the Constitutional Court’s judgment together with an explanation of why it is deeply politically biased.

## The judgment of the Court

The Constitutional Court rejected all the petitions submitted by the ordinary courts on every single ground. The justices began by declaring that Decision no. 38/2012. (XI. 14.) – which had invalidated a similar rule of the Act on Misdemeanors – was not “good law” anymore, because the Seventh Amendment changed the constitutional text to such an extent that the relevant previous case law was rendered inapplicable.

After that the justices interpreted the newly inserted Section XXII of the Fundamental Law and adopted a very communitarian reading of the constitutional text emphasizing the responsibility of the individual towards society. From this general responsibility stems the homeless people's duty to cooperate with the state so that it can fulfill its positive obligation in the field of social assistance. "The Constitutional Court emphasizes again that the duty to cooperate does not depend on the individual's choice, it is her constitutional obligation as an individual responsible for herself and to the community." [para. 63] The justices finished this line of argument by saying that section 178/B did not criminalize homelessness as a status, but the individual's active refusal to cooperate with the state in order to benefit from the available social assistance. Enforcing the duty to cooperate by making it a punishable offence in the Act on Misdemeanors did not constitute a violation of the Fundamental Law according to the Court.

The justices continued by stating that – contrary to the arguments submitted by the petitioning courts – the challenged provisions satisfied the general requirements of legal clarity and did not leave room for the arbitrary application of the law. It is the task of the ordinary courts to remedy the legal uncertainties.

The Court also rejected the arguments alleging the discriminatory character of the challenged provisions by saying that the prohibition of "residing in public spaces as habitual dwelling" has a general, sufficiently abstract character and nothing indicates that homeless people would be specifically targeted by the law.

The Court, after a very brief analysis, declared that the provisions on the mandatory placement of defendant(s) under short term arrest applicable in proceedings initiated for violation of section 178/B do not limit personal freedom unconstitutionally, because the general procedural guarantees are available for those who are placed under arrest.

Then came the very essence of the case: the alleged violation of human dignity. The petitioning judges argued that the criminalization of "residing in public spaces as habitual dwelling" in practice forces homeless people into the system of social assistance and deprives them of the choice to live their life according to their own will. The Constitutional Court started to address this issue by saying that the challenged regulation does not interfere with the core of human dignity, it only affects the right to autonomy which is on the periphery of human dignity. The right to autonomy is inseparable from all the duties (most importantly the duty to cooperate with the state institutions) and prohibitions (prohibition of living in public places on a permanent basis) articulated in or stemming from the Fundamental Law. "According to the values of the Fundamental Law no one has the right to be poor or homeless, this status is not part of the right to dignity [...]." [para. 102] By reversing the logic of the applicants' argument, the Court concluded that forcing someone into the social assistance system actually serves the protection of human dignity.

The only consolation given by the Court was the declaration of a somewhat ambiguous constitutional requirement: the sanctions envisaged by section 178/B may only be applied if the enforcement agencies can prove that the placement of the homeless person in a shelter would have been possible. The application of the

challenged provisions of the Act on Misdemeanors has to comply with the prohibition of living in public places on a permanent basis and the engagement of vulnerable groups in the system of social assistance as articulated by the Fundamental Law.

## **The clear signs of political bias**

There is no doubt that the outcome of the case is devastating. What makes it even more difficult to process the result is the very poor quality of the Court's reasoning. This poor quality does not stem from the justices' intellectual inability to adequately address the issues involved in this case, but from unacceptable political considerations spread among the members of the Court. Let me give you a short list of the most obvious signs political bias.

Firstly, the Court waited with the decision of the case for an unreasonably long time. The Fundamental Law provides that the Constitutional Court has to pronounce the judgment in a case within 90 days if it is initiated by an ordinary judge. In practice, however, the Court interpreted this rule in a way to allow the extension of the deadline every time another ordinary judge submitted a new request concerning the same issue, even though they all presented by and large similar arguments. The very first petition was registered on 31 October 2018, but the Court rendered its judgment only in the beginning of June. What happened before the two dates was, on the one hand, a relatively strong resistance to the newly adopted legislation on the part of social and professional groups and, on the other hand, the political campaign leading up to the European parliamentary elections. Once the manifestations were over and the Fidesz-KDNP parties won the majority of the seats in the EP, the justices were finally ready to decide the case.

Secondly, throughout its reasoning the Court adopts a very one-sided approach which clearly favors the government's opinion. After the arrival of the first petitions, the Constitutional Court invited the government and certain organizations to express their opinion on the case. Not surprisingly, all these submissions supported the newly inserted section 178/B in one way or another. However, several other actors raised their voices against the criminalization of homelessness. Amici curiae were submitted by the [UN Special Rapporteur on adequate housing](#), [two former justices of the Constitutional Court](#) (Miklós Lévy and László Kiss), and [three human rights NGOs](#), namely the Hungarian Helsinki Committee, the Hungarian Civil Liberties Union and the Streetlawyers' Association. Even though these amici curiae presented very elaborated arguments and hard data substantiating the unconstitutionality of the challenged law, the Court did not even mention them in the judgment. The justices decided to simply ignore all the submissions which did not support their reasoning.

Thirdly, the Court failed to provide a sufficiently detailed and convincing reasoning in its judgment. The petitioning judges alleged the unconstitutionality of the challenged law on many grounds. It is true that quality and quantity do not necessarily go hand in hand, but several arguments presented in the petitions were rejected only in a few paragraphs containing very general and superficial reasoning. This lack of adequate legal analysis strengthens the impression that the justices acted out of political motivations instead of legal considerations.

Fourthly, the Court completely submitted to the will of the legislator and the constituent power. Do not forget that the very same Fidesz-KDNP majority adopted the Fundamental Law which introduced the criminalization of homelessness a few year later. In one of my [articles](#) published shortly after the entry into force of the Fundamental Law, I argued that the constitution-making power deliberately reformulated the bill of rights and fundamentally changed the value system of the constitution in order to validate in advance political measures manifestly incompatible with the basic principles of liberal constitutional democracy. Whether these illegitimate aims can be realized in practice depends to a large extent on the members of the Constitutional Court. In the present judgment, the justices accepted without any resistance or criticism the will of the political majority.

## Conclusion

An excellent Hungarian constitutional lawyer/attorney at law posted on Facebook a few days ago that the present judgment of the Constitutional Court reminded him of the Constitutional Council's practice. A few years before the change of regime in 1989/90 a parliamentary committee was set up within the Hungarian National Assembly to exercise some sort of constitutional review. The Council, composed of members of parliament, was obviously a sham institution, but it was supposed to create the illusion that constitutionalism is an important value in the socialist dictatorship as well.

The Fidesz-KDNP coalition has been in power since 2010 and it has successfully turned the Hungarian political system into an illiberal regime. The Constitutional Court was among the very first victims of the cabinet's revolutionary reforms: its competences have been limited, its decisions have been overturned by constitutional amendments, the bench has been packed with government appointees etc. Everybody knows the story by heart. It is a clear that the Court operates in a very hostile political environment. I have been constantly arguing that a certain amount a self-restraint, the strategic avoidance of direct conflict with the ruling political parties is a normal reaction of a constitutional court in such a situation.

However, self-restraint cannot lead to unconditional subservience to the government under any circumstances. The very aim of constitutional review is to exercise control over the political branches, not to help them undermine the established constitutional standards. Unfortunately, day by day the Hungarian Constitutional Court is getting closer to become nothing more than a sham institution, like those constitutional control mechanisms operating in authoritarian regimes. We are at a point where Hungarian scholars and university professors are asking themselves whether it makes any sense to analyze and teach the recent jurisprudence of the Court, because in politically sensitive cases the justices usually go way below every acceptable professional standard.